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Conference

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 MARBLEGATE ASSET MANAGEMENT,
4 L.L.C., et al.,

Plaintiffs,

v.

14 CV 8584 (KPF)

6 EDUCATION MANAGEMENT
7 CORPORATION, et al.,

8 Defendants.

9 -----x

10 February 4, 2015
11 3:00 p.m.

12 Before:

13 HON. KATHERINE POLK FAILLA,

14 District Judge

15 APPEARANCES

16 AKIN GUMP STRAUSS HAUSER & FELD LLP

Attorneys for Plaintiffs

17 BY: SEAN E. O'DONNELL

LUCY C. MALCOLM

18 WACHTELL, LIPTON, ROSEN & KATZ

Attorneys for Defendant Education Management Corporation

19 BY: EMIL A. KLEINHAUS

ALEXANDER LEES

20 MILBANK, TWEED, HADLEY & MCCLOY LLP

21 Attorneys for the Ad Hoc Committee of Term Loan Lenders of
22 Education Management

23 BY: ANTONIA M. APPS

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1 THE DEPUTY CLERK: All rise please.

2 THE COURT: Good afternoon. Thank you very much.

3 Please be seated.

4 (Case called)

5 MR. O'DONNELL: Good afternoon, your Honor. May it
6 please the Court, Sean O'Donnell, Akin Gump. And with me is
7 Lucy Malcolm. We represent the plaintiffs in this proceeding.

8 THE COURT: Okay. Good afternoon.

9 MR. KLEINHAUS: Good afternoon, your Honor, Emil
10 Kleinhaus, Wachtell Lipton. I'm here with Alexander Lees. We
11 represent the Education Management defendants.

12 THE COURT: Good afternoon.

13 MS. APPS: Good afternoon, your Honor, Antonia Apps of
14 Milbank. We represent the Ad Hoc Committee of Term Loan
15 Lenders.

16 THE COURT: All right, good afternoon to all of you.
17 Thank you for coming in this afternoon. It does make more
18 sense that we meet today, rather than last Monday because it
19 was a little bit snowy. So I appreciate your patience. And I
20 really was doing it for your safety and no other reason.

21 Why don't we -- let's talk about what's been proposed.

22 Mr. O'Donnell, let me begin with you, sir. I am
23 assuming, because I'm clever like that, that the prospects of
24 settlement are dim, and if and when they materialize you'll let
25 me know so I don't have to ask you about it; is that correct?

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1 MR. O'DONNELL: I can certainly confirm the latter
2 part of that, your Honor.

3 THE COURT: All right, that's lovely.

4 Let's then talk about the stipulation.

5 What is confusing to me is the fact that when I look
6 at Rule 65 and they talk about combining the hearing or
7 allowing a hearing and the trial to sort of be in some
8 aggregated unit, I tend to think of that as a decision that's
9 made before the hearing takes place, as opposed to a situation
10 where after the hearing the parties say, okay, that plus these
11 materials is all we need. So I'm not saying you can't do it,
12 and I guess I sort of have the view that if all the parties
13 consent, then there's, you know, it's kind of a waiver and I'm
14 not going to fight it, but I guess I'm just trying to
15 understand. This is something we can do. It just seems odd to
16 me to be doing it after the hearing has already taken place.

17 MR. O'DONNELL: Yes, your Honor.

18 My understanding is, in fact, that it can be done
19 either before or after the proceeding, and that it can be done
20 by stipulation of the parties or sua sponte by the Court, and
21 that the analysis is really whether or not it would prejudice
22 the parties. And since here it's being done by stipulation, I
23 think it would be certainly without prejudice.

24 THE COURT: Okay, all right.

25 And, Mr. Kleinhaus, can I talk to you on that same

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1 point.

2 MR. KLEINHAUS: Sure. I agree with what Mr. O'Donnell
3 said. We did, in looking at this issue, look for cases that
4 involved stipulations or agreements after the PI stage, and we
5 did find such cases. So we got comfortable that it doesn't
6 necessarily have to be done beforehand, but rather can be done
7 by agreement afterwards. And in this particular situation
8 we've stipulated as well to add a few exhibits. And we
9 stipulated on a schedule for limited supplemental briefing
10 before the matter is finally submitted.

11 THE COURT: All right. Well, while you're speaking,
12 let me ask you this.

13 MR. KLEINHAUS: Sure.

14 THE COURT: Do I understand, then, that the parties
15 are waiving any objections to any evidence that was introduced
16 at the preliminary injunction hearing? I ask this question
17 because in some cases there are slightly different
18 admissibility standards between the preliminary injunction
19 hearing and let's say a trial. I just want to make sure
20 everybody is of the view that everything that was admitted
21 either at the hearing or through the stipulation that the
22 parties are presenting to me now is appropriately admitted and
23 may be considered, and no one's going to later on object to it?

24 MR. KLEINHAUS: Yes. What's mentioned in the
25 stipulation, which is the exhibits at trial, including the

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1 affidavits and the expert reports, we, and I believe the
2 plaintiffs, have stipulated are admissible.

3 THE COURT: Okay. Can I also ask -- and I'll direct
4 this to Ms. Malcolm because I know she's the brains of the
5 operation -- can I have, just so that I'm sure of it, a list of
6 all of the exhibits that I am to consider? And I guess, Mr.
7 Lees, maybe I should be -- I don't know if I should direct this
8 to you as well, sir. I know I was given a list at the close of
9 the hearing. I was given a number of documents, then I was
10 told to not consider certain things. My concern is simply that
11 as time has passed and the parties' views have evolved, I just
12 want to make sure I have the most complete list. So may I
13 have, either jointly or separately, a list of what I am
14 supposed to consider?

15 MS. MALCOLM: Yes. I don't have it for you now, but
16 we'll confer with the defendants and intervenor and make sure
17 we get you one list of everything to consider.

18 THE COURT: Okay.

19 MR. O'DONNELL: I second that.

20 THE COURT: Okay, terrific. Thank you. And just as
21 well, that was a little ploy on my part because it's my belief
22 that both of you should be speaking more in this courtroom, but
23 that's okay too. I just did. But that's fine. And thank you
24 very much.

25 All right, so let me ask a couple -- I have notes to

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1 myself, most of which are I think obviated by the discussion
2 we're now having, and some of these were prepared in advance of
3 the conference on Monday when I didn't have the stipulation to
4 look at. So these issues have been resolved.

5 And I'm assuming parties are waiving any objections to
6 any procedural form that's envisioned by the stipulation.

7 The briefing schedule. I have no problem with it. I
8 just want to make sure that recent inclement weather hasn't
9 caused anybody to need to change the dates.

10 So, Mr. O'Donnell, I'll start with you because you're
11 in front of me.

12 MR. O'DONNELL: Thank you, your Honor. Not to our
13 knowledge.

14 THE COURT: Okay. And, Mr. Kleinhaus, you guys have
15 the -- I mean, you have the more aggressive schedule I might
16 argue. So you're okay with it, Mr. Lees?

17 MR. LEES: I got permission to answer.

18 THE COURT: Excellent.

19 MR. LEES: Yes. We are comfortable sticking with
20 what's in the stipulation?

21 THE COURT: Ms. Apps, I thought it was a joint
22 submission, so?

23 MS. APPS: It is joint. We're good.

24 THE COURT: Okay, excellent. And Mr. O'Donnell told
25 me he does not need more time.

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1 Can I understand a little bit about this proposal, and
2 this is to you, Mr. O'Donnell. The suggestion is that the
3 factual record is closed at the close of the briefing schedule,
4 but there is a possibility that plaintiffs could supplement the
5 record after receiving the brief from the defendants and
6 intervenors. And I guess there's as well a companion provision
7 that the defendants and intervenors can supplement with
8 objections after your brief comes. In at what point do I know
9 that all of the evidence that is in is supposed to be in? Will
10 I know -- I mean, because there may be a reply brief sought,
11 there may not be a reply brief sought. I just want to know
12 when I can start considering what I've been given to consider.

13 MR. O'DONNELL: That's a great question, your Honor.

14 We're happy to coordinate with the parties and provide
15 a date certain as to when that record will be closed. I think
16 because there is a companion provision and they're reserving
17 their rights to supplement as well, that it would be at some
18 point after our response is submitted. Because they've
19 reserved their right not only to seek to put in additional
20 papers in response to our response, but also to supplement the
21 record if they think that's appropriate.

22 So my guess is that it would be at some point after we
23 submit our reply. I'm happy to work with the other parties and
24 just simply advise the Court on a prompt basis. If you want a
25 date certain, we can do that too.

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1 THE COURT: I appreciate the offer. I don't think I
2 need a date certain. I think I just need to let you know that
3 at some point I'd like to know when the factual record is
4 closed. So as long as each of you here knows that somebody at
5 some point has to let me know that, that's great. I just want
6 to make sure that I -- you know, because I don't want to be
7 basically waiting for more documents, only to learn they're not
8 coming.

9 MR. O'DONNELL: We'll do that, your Honor.

10 THE COURT: Okay, terrific.

11 To the best of my knowledge, that's really -- I
12 understand the big issue, by the way, is that I have to
13 actually sign the stipulation. I have not forgotten about it.
14 I did just want to raise these issues with you before I did.

15 Those are the only concerns I had about the
16 stipulation and about the parties' proposal.

17 Is there anything else you want to raise with me since
18 you're all here?

19 Ms. Malcolm, anything?

20 MS. MALCOLM: The plaintiffs have nothing else, your
21 Honor.

22 THE COURT: Thank you very much.

23 MR. LEES: We have nothing more.

24 THE COURT: Okay. Ms. Apps?

25 MS. APPS: Nothing from the intervenor.

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1 THE COURT: All right. Thank you very much. I'm
2 sorry this was -- well, I'm not sorry. This is a short
3 conference but very useful nonetheless. Thank you very much
4 for coming this afternoon.

5 MR. O'DONNELL: Thank you, your Honor.

6 (Adjourned)